85-93

No. .....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

P. E. BAZEMORE, *et al.*,

Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

(1) Did the court of appeals err in holding - that it is both legal and constitutional for a state to intentionally pay black employees less than white employees in the same job, so long as the original decision establishing that discriminatory wage differential was not itself the subject of a timely charge or action?

(2) Did the court of appeals err in holding that statistics may not be treated as probative evidence of discrimination unless the statistical analysis considers every conceivable non-racial variable?

(3) Did the court of appeals err in holding that a state may satisfy its obli-

gation to desegregate a de jure system by adopting a freedom of choice plan that fails?

(4) Did the court of appeals err in holding that an employer may immunize itself from liability under Title VII by delegating its employment decisions to discriminatory a third party?

(5) Did the court of appeals err in denying class certification in this case?

PARTIES

The petitioners in this action are: P. E. Bazemore; James E. Wright; George E. McDaniel; Plese Corbett; Calvin Hargrave; Fred Belfield, Jr.; W. N. Payton, Jr.; L. C. Cooper; Chester L. Bright; Johnnie Jones, III; Lloyd L. Peace; James P. West; E. C. Short; Haywood E. Harrell; D. B. Waymer; Roosevelt Lawrence; Booker T. McNeill; Richard M. Edwards; L. E. Baldwin; Leroy James; Robert L. Lancaster; Henry Revell, Jr.; Clifton M. Grimes; Chester Stocks; Avant P. Coleman; Percy W. Williams; W. C. Stroud; Elizabeth Ivey, Administratrix of the Estate of D. O.

Ivey, deceased; Cassius S. Williams; Samuel Taylor; Fletcher Barber; R. E. Wilkins; J. H. Wallace; Eva L. Greene, Administratrix of the Estate of Cleo Rich Greene; Warren G. Barnes; Hoover M. Royals; Thelma Graves Turner, Administratrix of the Estate of J. A. Turner; S. T. Lloyd; Hernando F. Palmer; Clifton Parker; W. F. Wright; Clarence Stockton; Earl G. Swann; I. W. Murfree; J. M. Spaulding; Mary C. Martin; Alma C. Hobbs; Martha B. Thomas; Ann Coston; Esther B. Roscoe; Minnie B. Taylor; Jo Ann Fleming; Jeanette B. Sherrad; Inez W. Foster; Carrier U. Lindsey; Geraldine H. Ray; Mary I. Parham; Dianne Stanley and Dorothy M. Mobley; Louise P. Slade; Marilyn White; Pennie P.

Battle; Joyce P. Hunter, on their own behalf and on behalf of all others similarly situated; Timothy Bazemore; Eddie Watford; Willie Ryan; Alice Ballance and Herbert White, on their own behalf and on behalf of others similarly situated; Mary B. Crawford and Essie Moore, on their own behalf, and on behalf of all others similarly situated; Deborah Jean Hart, by her father and next friend, James Hart; Herman Hinton, by his father and next friend, James Hinton; Bernice Staton and Marian Staton, by their father and next friend James Staton, on their own behalf and on behalf of all others similarly situated.

The respondents are: William C. Friday, President of Consolidated University of North Carolina;

John T. Caldwell, Chancellor of North Carolina State University; George Hyatt, Jr., Director of North Carolina Agricultural Extension Service; The Board of Trustees of the University of North Carolina, a body politic and corporate; The University of North Carolina, a body politic and corporate; and Crawford Amick, Hassell Thigpen and James G. Martin, County Commissioners, on their own behalf and on behalf of all others similarly situated.

The United States of America, John R. Block, Secretary of Agriculture, and Dr. Mary Nell Greenwood, Deputy Director, Science and Education Administration Extension, were also plaintiffs in the proceedings below.

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October Term, 1984

P. E. BAZEMORE, et al.,

Petitioners,

v.

WILLIAM C. FRIDAY, et al.,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners P. E. Bazemore, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 10, 1984.

OPINIONS BELOW

The opinion of the court of appeals is reported at 751 F.2d 662 and is set out at pp. 346a-481a of the Appendix. The order denying rehearing, which is not reported, is set out at p.482a. The district court's memorandum of decision of August 20, 1982, regarding class claims, which is not reported, is set out at pp. 3a-207a of the Appendix. The district court's memorandum of decision regarding individual claims, dated September 17, 1982, is set out at pp. 216a-345a.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1985. A timely petition for rehearing and suggestion for rehearing en banc was denied by an evenly divided court on April 15, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

Section 601 of Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a), provides in pertinent part

> It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire ... any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

Section 706(e) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(e), provides in pertinent part:

> (e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred....

Section 1 of the Fourteenth Amendment provides, in pertinent part, "No state shall ... deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This is an action seeking to redress intentional racial discrimination in the operation of the North Carolina Agricultural Extension Service. ("NCAES") NCAES is a federally funded state agency which provides assistance to farmers throughout

North Carolina, and which organizes and assists the system of 4-H clubs in that state. Prior to 1965 NCAES was a de jure segregated agency operating along strictly racial lines. There were separate black and white offices in each county, with each servicing exclusively black and white citizens respectively. The several thousand state assisted 4-H clubs were also organized along racial lines. It was the avowed policy of the defendant to pay black workers lower salaries than were paid to whites in the same positions. The black and white offices were merged in 1965, but the differences in the salaries of the black and white employees performing the same jobs were never eliminated, and no steps were taken to merge the separate all-white and all-black 4-H clubs operating side by side in communities throughout the state.

This action, commenced in 1971 in the United States District Court for the Eastern District of North Carolina, was initially filed by private plaintiffs, including NCAES employees, seeking to redress a variety of forms of intentional racial discrimination alleged to exist at NCAES. In 1972 the United States of America intervened as a plaintiff in the action, advancing essentially the same claims as the individual plaintiffs. Following a lengthy trial the district court rejected on the merits all the claims of both the United States and the private plaintiffs. On appeal a divided panel affirmed the decision of the district court; Judge Phillips, dissenting, insisted that the denial of relief was an error as a matter of law.

A timely petition for rehearing was filed, together with a suggestion for rehearing en banc. Five members of the

fourth circuit voted to grant rehearing en banc, Judges Winter, Murnaghan, Sprouse, Ervin, and Phillips. The court of appeals was evenly divided on the petition, and rehearing en banc was therefore denied.

This case presents several somewhat interrelated claims of intentional discrimination. First, the plaintiffs alleged that the different salary scales established prior to 1965 for black and white workers hired prior to 1965 still remained in effect, and that blacks hired before 1965 continued to be paid less than white colleagues holding the same positions. The district court and the court of appeals concluded that pre-1965 pay differentials for black and white workers indeed remained in effect,[1] but both courts held that the continued use of such differentials violated neither Title VII

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[1] 30a-31a, 122a, 201a, 359a, 360a, 390a.

nor the Fourteenth Amendment.[2] Judge Phillips dissented, insisting that those salary differentials were both illegal and unconstitutional.[3]

Second, the plaintiffs alleged that NCAES engaged in intentional racial discrimination in fixing the salaries of workers hired after 1965, and in determining raises for pre-1965 hires. The plaintiffs introduced statistics demonstrating that the average salaries of white workers were consistently higher than the average salaries of black workers in the same jobs and with the same amount of seniority and education. Both courts below concluded that proof that black and white workers holding the same position were paid different salaries was as a matter of law devoid of evidentiary significance, and could provide no support

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[2] 122a, 380a-82a.

[3] 462a-66a.

for the claims of intentional racial discrimination in compensation.[4] Again Judge Phillips dissented, arguing that such statistical evidence clearly demonstrated intentional racial discrimination in compensation.[5]

Third, the plaintiffs alleged that the defendants had engaged in intentional racial discrimination in selecting the County Chairmen, the salaried official responsible for supervising the NCAES office in each county. The record showed that between 1965 and 1981 no black had ever been appointed to a county chairmanship for which a white male also applied; of 123 appointments in this period, only 6 went to blacks, and only one black County Chairman was appointed prior to 1976. The court of appeals agreed that there was evidence of discrimination, but concluded

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5 131a-136a, 389a, 392a.

448a-462a.

that any discrimination was on the part of local officials to whom NCAES delegated decisions between black and white applicants, and that NCAES was immune from liability for such discrimination.[6]

Fourth, the plaintiffs asserted that continued state assistance to several thousand single race 4-H clubs violated both Title VI and the Fourteenth Amendment. Following the enactment of Title VI, the defendants had adopted a freedom of choice plan that failed; there were 1,474 all-white clubs in 1965, and 1,348 all-white clubs in 1980. Despite this Court's decision in Green v. School Board of New Kent County, 391 U.S. 430 (1968), both courts below held that NCAES was under no obligation to take any steps to desegregate the clubs.[7] Judge Phillips dissented, contending that the majority

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[6] 412a-13a.

[7] 165a-184a, 424a, n. 128.

opinion erred in refusing to comply with Green.[8]

Fifth, the private plaintiffs presented individual claims of discrimination in compensation or in promotion to the position of County Chairman. Both courts below regarded the resolution of these claims as controlled by their views of the merits of the related class-wide claims.[9]

Finally, the district court believed class certification in a private Title VII case was impermissible if, as here, the United States had filed a pattern or practice action.[10] Judge Phillips insisted

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9 469a-481a.

218a, n.70, 380a. Petitioners believe that this position was essentially correct. Reversal by this Court on the pattern and practice issue would necessarily require reversal of disposition of the individual claims. For that reason, the disposition of the individual claims is encompassed within questions 1, 2 and 5.

10 45a.

that this reasoning was inconsistent with General Telephone Co. v. EEOC, 446 U.S. 318 (1980),[11] and the majority declined to defend it.[12] The majority, however, held that denial of certification was proper, because it rejected on the merits the legal claims which petitioner sought to present on behalf of the claims. Judge Phillips again dissented.[13]

Petitioners sought rehearing en banc on each of these issues, and five members of the court of appeals voted to rehear all of them en banc.

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[11] 432a-33a.

[12] 372a-73a.

[13] 426a-33a.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE APPLICATION OF RACIALLY MOTIVATED WAGE SCALES VIOLATES TITLE VII OR THE FOURTEENTH AMENDMENT

The decision in this case marks a clear and dangerous departure from what until now has been the uniform view of seven circuits regarding the legality of racial discrimination in salaries. For fifteen years every appellate court which has considered this issue has concluded that, where an employer intentionally establishes different salaries for white and black employees because of their race, that practice violates Title VII and the Fourteenth Amendment, where applicable, as long as that pay differential remains in effect. Every prior decision has held discrimination in compensation to

be continuing violation, recurring anew with each pay period.

The panel opinion in this case now adopts the opposite rule. The facts with regard to this issue are not in dispute. Prior to 1965, when many of the petitioners were initially hired, North Carolina's Agricultural Extension Service was operated as a de jure segregated system. Black employees worked in separate offices, serviced only black citizens, and were deliberately paid less than white employees doing the identical work in the white offices. In 1965 the offices were merged, but no changes were made in the salaries; black and white employees worked side by side performing the same duties but continued to receive different salaries. Both courts below found that these racially based salary differentials continued well past 1971, the year in

which this action was filed,[14] and petitioners contend that those disparities persist to this day.[15] The fourth circuit, however, held that these practices violated neither Title VII nor the Fourteenth Amendment. (80a-82a). The majority opinion holds, not only that North Carolina is free to pay blacks hired prior to 1965 less than whites for the rest of their lives, but that the state may in the future give black employees smaller raises than comparable whites so long as those raises are based on the racially motivated pay schedules established in the past. (390a).

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[14] 30a-31a, 122a, 201a, 359a, 360a.

[15] The fourth circuit noted, "the Extension Service admits that, while it had made some adjustments to try to get rid of the salary disparity resulting on account of pre-Act discrimination, it has not made all the adjustments necessary to get rid of all of such disparity." 390a.

The majority below believed that this extraordinary conclusion was required by this Court's decision in United Airlines v. Evans, 431 U.S. 533 (1977), a reading of Evans that has been expressly rejected by several other circuits. The fourth circuit reasoned that the only discrimination in compensation forbidden by Title VII or the Fourteenth Amendment is an employer's initial decision establishing the level of compensation for an individual or position; the continued application of that racially based rate of pay, which may recur over years or even decades, was held to be entirely lawful. Judge Phillips dissented, insisting that Evans did not sanction the use of "a "pattern of salary discrimination that carries forward differentials originating" prior to the adoption of Title VII or prior to the commencement of the relevant limitations period. (462a-466a). But the

majority held that the Constitution forbids only the creation, but not the implementation, of separate and unequal wage scales for blacks and white, and concluded that the Congress that adopted Title VII did not wish to affect the salaries of blacks then being paid less than whites for doing the same work, but intended to leave an entire generation of women and minorities in that inferior position so long as they continued to hold the same jobs that they held in 1965.

Seven circuits over 15 years have uniformly rejected this interpretation of Title VII and the Fourteenth Amendment. As early as 1969, in a decision joined by then circuit judge Blackmun, the eighth circuit held in Norman v. Missouri Pacific Railroad, 414 F.2d 73, that discrimination in compensation was a "continuing" violation of the law. 414 F.2d at 84-85. The controversy in Norman concerned

pre-Act pay differentials that dated from 1918. 414 F.2d at 76, 81. In Laffey v. Northwest Airlines, Inc., the District of Columbia circuit also concluded that discrimination in salaries was a continuing violation, and afforded relief to correct pay differentials that had been established in 1947 and that had first been applied to the lead plaintiff in 1958. 567 F.2d 429, 437-38, 473 (D.C. Cir. 1976).

This Court's decision in United Airlines v. Evans made clear that claims of continuing violations were to be closely scrutinized, but until the instant case all circuits remained in agreement that Title VII forbade the application as well as the creation of a racially based compensation scheme. In Lamphere v. Brown University the first circuit held that Evans did not permit an employer to pay

a female employee a lesser wage based on a discriminatory pre-Act salary schedule:

> A discriminatory ... decision, made prior to the effective date of the Act, but implemented post-Act, is actionable .... [A] decision to hire an individual at a discriminatorily low salary can, upon payment of each subsequent pay check, continue to violate the employee's rights.

685 F.2d 743, 747 (1st Cir. 1982). Twice since this Court's decision in Evans, the fifth circuit has held that salary discrimination is a continuing violation, and that, in addition to the original decision establishing a salary scale, "each discriminatory pay check violates the act." Berry v. Board of Supervisors of Louisiana State University, 715 F.2d 971, 980 (5th Cir. 1983).[16] In Hall v. Ledex,

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[16] Berry discussed Evans at 715 F.2d at 971. A similar interpretation of Evans can be found in Perez v. Laredo Junior College, 706 F.2d 731, 733-34 (5th Cir. 1983). In Calcote v. Texas Educational Foundation, 578 F.2d 95 (5th Cir. 1978) a black and a white with similar credentials were hired

669 F.2d 397 (6th Cir. 1982), the plaintiff complained that when she was named to a supervisory position she was paid only two-thirds of the salary given to men in that job. The defendant asserted the action was untimely, since the plaintiff had not filed her complaint with EEOC until over a year after her salary was fixed.[17] The sixth circuit rejected that contention, insisting "the discrimination was continuing in nature. Hall suffered a

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to do the same work but given different job titles and salaries. The Fifth circuit held that the defendant was in violation of Title VII even though later it placed both employees in the same classification, since each kept "his prior salary level." 578 F.2d at 96-97. In Clark v. Olinkraft, 556 F.2d 1219 (5th Cir. 1977), decided shortly after Evans, the fifth circuit upheld the plaintiff's contention that salary discrimination in 1974, although based on wages established in 1964, was "a continuing and unlawful employment practice in violation of Title VII." 556 F.2d at 1222.

[17] The defendant relied in particular on Delaware State College v. Ricks, 449 U.S. 250 (1980). See 669 F.2d at 399.

denial of equal pay with each check she received." 669 F.2d at 398.

Similarly, the eighth circuit has reiterated since Evans its view that salary discrimination is a continuing violation. In Satz v. ITT Financial Corp., 619 F.2d 738 (8th Cir. 1980), the plaintiff did not file a charge with EEOC until more than 180 days after her employer set her salary at a level lower than that of men doing the same work. The court of appeals rejected the employer's contention that the charge was untimely, holding that "[t]he practice of paying discriminatorily unequal pay occurs not only when an employer sets pay levels, but as long as the discriminatory differential continues." 619 F.2d at 743.[18] In Bart-

[18] See also Di Salvo v. Chamber of Commerce, 598 F.2d 593, 595 (8th Cir. 1978) (salary discrimination claim upheld despite the fact that the disputed salary was fixed more than 180 days prior to the filing of a charge.)

lett v. Berlitz School of Languages, 698 F.2d 1003 (9th Cir. 1983), the employer made precisely the argument sustained by the fourth circuit in this case, that only the original action establishing an employee's wages violates Title VII.[19] The ninth circuit rejected that contention, holding that "paying lower wages to female employees on each payday constitutes a 'continuing violation'". 698 F.2d at 1004. The third circuit dealt with claims similar to those in the instant case in International Union of Electrical Workers v. Westinghouse, 631 F.2d 1094 (3d Cir. 1980), in which the plaintiffs alleged that the employer's wage scales, which provided the lowest salaries for predominantly female jobs, had been established

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[19] See 698 F.2d at 1005 n. 1: "Berlitz's primary argument is that the limitations period should run from the date the plaintiffs became [employees] because it was at this time that their allegedly discriminatory wages were set."

as the result of an intentional policy to discriminate against women. 631 F.2d at 1097. The third circuit held that those allegations stated a cause of action under Title VII, despite the fact that the salary scales at issue had been created in the 1930's, a generation prior to the adoption of Title VII itself.

The division in the circuits on this issue is typical of the widespread disagreements among the lower courts as to the meaning of United Airlines v. Evans. The fifth circuit has aptly described those subsequent interpretations of Evans as "inconsistent and confusing". Dumas v. Town of Mount Vernon, 612 F.2d 974, 977 (5th Cir. 1980). The courts of appeals are also divided, for example, over whether or when discrimination in hiring[20]

[20] Compare, Roberts v. North American Rockwell Corp, 650 F.2d 823 (8th Cir. 1981) (hiring discrimination a continuing violation not subject to the rule in Evans) with Dumas v. Town of Mount Vernon, 612 F.2d 974 (5th Cir. 1980) (hiring

or discrimination in promotions[21] constitute continuing violations of the law.

The fourth circuit's decision in this case, unless overturned, will largely emasculate the statutory and constitutional prohibitions against racial discrimination in compensation. Both Title VII and the Fourteenth Amendment, where applicable, forbid an employer to intentionally assign a lower wage to a particular position because most or all of the employees in that position are black or female. See County of Washington v. Gunther, 452 U.S. 161 (1981). But such discriminatory wage systems ordinarily were established, as was the case in

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discrimination is not a continuing violation and is thus subject to the rule in Evans).

[21] Compare Dumas, supra (promotion discrimination is a continuing violation not subject to the rule in Evans) with Cajidas v. Banco de Ponce, 741 F.2d 464, 469-70 (1st Cir. 1984) (Evans is applicable to some but not all discrimination in promotions).

Gunther,[22] long prior to the adoption of Title VII or the beginning of the limitations period relevant to the constitutional claim.[23] If, as the fourth circuit has held, only the creation of such discriminatory wage scales, but not their application, is unlawful, then Gunther and the principle it establishes would be a dead letter.

The same is true of the statutory and constitutional prohibitions against intentional racial discrimination in the fixing of salaries for particular employees. Unlike discrimination in promotions or assignments, the effects of which are often obvious to all involved,

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[22] The existence of a separate position for female prison guards dated from prior to 1955. See note at Ore. Rev. Stat. § 137.350

[23] See, e.g. Norman v. Missouri Pacific Railroad, 414 F.2d 73, 84-85 (8th Cir. 1969) (system established in 1930's); Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 437-38 (D.C. Cir. 1978) (system established in 1947).

the existence of discrimination in compensation is only rarely apparent, since the victims of that practice usually do not know the salaries of their white colleagues, and ordinarily have no method of comparing their wages with those of others doing the same work. In a substantial proportion of all reported Title VII wage compensation cases, the plaintiffs were unable to detect that statutory violation until it was already too late to file a charge with regard to the initial action establishing their salaries.

The fourth circuit decision is manifestly incorrect. It is simply inconceivable that the Congress which adopted the 1964 Civil Rights Act intended to provide no redress for blacks who were then being paid less than whites for the same work. It is equally unlikely that Congress intended to prohibit judicial scrutiny of the pre-Act origins of salary

scales when it clearly contemplated such inquiries into the original purposes of pre-Act senority systems. See Teamsters v. United States, 431 U.S. 324, 356 (1977). The fourth circuit's holding that Title VII does not forbid the continued use of racially based pre-Act salary scales is squarely contrary to this Court's resolution of the same question under the Equal Pay Act. In Corning Glass Works v. Brennan, 417 U.S. 188 (1974), this Court held unlawful pre-Act discriminatory salary scales that remained in effect after the adoption of the Equal Pay Act:

> The differential ... reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.

417 U.S. at 205. (Emphasis added).

As a matter of constitutional law, the decision of the fourth circuit -- that the Fourteenth Amendment forbids only the adoption, but not the implementation, of a racially motivated practice -- flies in the face of a century of Supreme Court decisions. This Court has repeatedly held unconstitutional the application of state laws adopted for racial reasons, no matter how old the laws themselves. The rule whose implementation was condemned in Hunter v. Underwood, 85 L.Ed. 2d 222 (1985), for example, had been established by the Alabama Constitutional Convention of 1901, even some eighty years before Underwood filed suit. If the North Carolina legislature had in 1964 fixed petitioner Bazemore's salary by statute, intentionally setting it at a lower level because of his race, every court in the land would have struck down that law as

unconstitutional. Surely the result is no different where, as here, the racially motivated state practice complained of was taken pursuant to an administrative decision rather than a state statute.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO THE ADMISSIBILITY OF STATISTICAL EVIDENCE OF INTENTIONAL RACIAL DISCRIMINATION

The fourth circuit decision in this case revives, and gives conclusive weight to, the very objection to the use of statistical evidence that this Court expressly rejected in both Dothard v. Rawlinson, 433 U.S. 321 (1977) and Teamsters v. United States, 431 U.S. 324 (1977). In Dothard the plaintiff relied on population statistics to show that an employer's hiring criteria had an adverse impact on women. The defendant urged that such data be deemed insufficient, arguing

that an analysis of actual applicants might have yielded a different result. The Court held that such speculation about the possible effect of a more refined statistical analysis was not an adequate basis for rejecting the plaintiffs' statistics:

> The plaintiffs in a case such as this are not required to exhaust every possible source of evidence.... If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own. In this case no such effort was made. 433 U.S. at 331.

Similarly, in Teamsters the employer objected to the significance of evidence that it employed a far smaller proportion of minorities than were present in the population. The employer insisted that half a dozen factors not considered in the plaintiff's analysis might have explained away that disparity, and presented an expert on statistics to criticize the

plaintiff's methodology.[24] But the employer adduced no statistics of its own indicating that the methodology it advocated would have yielded any different result, and this Court concluded that the plaintiff itself was under no obligation to "fine tun[e]" its statistics. 431 U.S. at 342 n. 23.

The fourth circuit in this case sustained precisely the unsubstantiated speculation objection disapproved in Dothard and Teamsters. The plaintiffs here adduced uncontroverted evidence that the average salaries of whites and blacks in the same job were consistently different, with the white average invariably higher.[25] This disparity was true for all

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[24] See Brief for Petitioner T.I.M.E.-D.C., Inc., pp. 18-20.

[25] The disparities in the wages of Associate Agricultural Agent, the single largest job title, were typical:

Year	Average Salary of Whites	Average Salary of Blacks	Difference

jobs, persisted for over a decade, and was present even when the experience and education of the employees was considered.[26] An expert retained by the defendant's conducted his own analysis of the data, and also concluded that at least until the mid-1970's there was a disparity between the salaries of blacks and whites in the same jobs. (387a). The fourth circuit, however, concluded that these disparities were "unacceptable as evidence of discrimination." (391a). It was of no significance, the court of appeals held, that the employer consistently paid whites more than similarly educated and experi-

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1970	$ 9,876	$ 8,956	$ 920
1971	10,241	9,558	682
1973	10,292	9,797	495
1974	10,244	9,840	404
1976	12,711	11,885	826
1978	14,754	13,518	1,236
1980	15,253	14,485	758
1981	17,035	15,849	1,186

App. 1562; GX 95, 98; PX 50, 100.

[26] App. 399-418; GX 122-24.

enced blacks doing the same work; no statistical analysis was entitled to any weight unless it considered "all measurable variables thought to have an effect on salary." (391a). (Emphasis added) The trial judge had speculated that there were at least nine additional variables that might have explained the disparities (133a), and the majority on appeal thought this speculative possibility fatal to plaintiffs claims. (389a-91a).

Judge Phillips correctly dissented from this aspect of the panel decision below, insisting that statistical evidence could not be rejected

> for failure to include a number of other independent variables merely hypothesized by defendants. ....[T]o apply such a rule generally would effectively destroy the ability to establish any Title VII pattern or practice claim by this means of proof . . . [I]t will always be possible for Title VII defendants to hypothesize yet another variable that might theoretically reduce a race-effect coefficient demonstrated

> by any multiple repression analysis that could be conceived. (448a-49a).

Judge Phillips stressed, as did this Court in Dothard, that there was no "evidence that the inclusion of other variables would in fact reduce" the disparities the wages of blacks and whites in the same job. (450a) (Emphasis in original). Correctly recognizing the substantial impact the majority opinion would have on the use of statistics in any future Title VII case, five members of the fourth circuit voted to rehear this case en banc.

The decision of the fourth circuit[27] sustaining the very speculation objection disapproved in Dothard and Teamsters is in square conflict with the decisions of the five courts of appeals that have dutifully followed the opinions of this Court. The District of Columbia circuit, citing Dothard and Teamsters, has rejected the fourth circuit's rule that statistical evidence should or can be rejected merely because it does not analyze every conceivably relevant factor:

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[27] The majority opinion rejected the individual claims of salary discrimination on a similar theory. Petitioners offered statistical comparisons of their wages with the wages of white agents with the same education hired at the same time into the same jobs. The majority dismissed that evidence on the ground that such comparisons did not also consider possible additional job qualifications or differences in job performance. (378a-379a). Both the majority and Judge Phillips agreed that the district court's decision rejecting the individual claims would have to be reversed if there was proof of a pattern and practice of salary discrimination. (380a, 467a).

> [U]nquantified, speculative and theoretical objections to the proffered statistics are properly given little weight by the trial court: 'When a plaintiff submits accurate statistical data, and a defendant alleges that relevant variables are excluded, defendants may not rely on hypothesis to lessen the probative value of plaintiff's statistical proof. Rather, defendant ... must either rework plaintiff's statistics incorporating the omitted factors or present other proof undermining plaintiff's claims.'[28]

Similarly, in a promotion discrimination case, the District of Columbia circuit insisted, contrary to the position of fourth circuit in the instant case,[29] that in a comparison of black and white

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[28] Trout v. Lehman, 702 F.2d 1044, 1102 (D.C. Cir. 1983), vacated on other grounds sub nom. Lehman v. Trout, 79 L.Ed.2d 732 (1984). See also Segar v. Smith, 738 F.2d 1249, 1277 (D.C. Cir. 1984) cert. den. ____ U.S. ____ (1985). (Omission of a variable does not affect validity of the statistics absent proof that the omission affected the outcome of the analysis.)

[29] See, n. 27, supra.

employees "not every conceivable factor relevant to a ... decision must be included in the statistical case in order to make out a prima facie case."[30]

The second circuit has also rejected the fourth circuit rule. In Guardians Association v. Civil Service Commission, 630 F.2d 79 (2d Cir. 1980), the defendant responded to evidence that its tests had an adverse impact on minorities by "hypothesiz[ing] some situations in which [the] statistics might be misleading ... but present[ed] no evidence to show that this occurred." 630 F.2d at 88 n. 7. The second circuit dismissed that objection out of hand:

> To accept such unsupported possibilities, and require the plaintiffs to refute every circumstance that could explain the disparate impact shown by the statistics, would create an onerous burden of proof, far in

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30 Davis v. Califano, 613 F.2d 957, 964 (D.C. Cir. 1980).

> excess of the Title VII standard as interpreted by the Supreme Court. See Dothard v. Rawlinson....

Id. Later in the same litigation the city again chose to object to a statistical analysis without offering a more complete analysis of its own. The second circuit, quoting Dothard at length, again rejected that approach:

> We see no justification for holding plaintiffs to an unrealistic standard regarding the "completeness" of their statistical showing.... [I]t is not inappropriate to expect a public employer to come forward with evidence ... even where the plaintiffs' showing has been somewhat modest.... [D]efendants offered no persuasive evidence of differences in preparation or content that would cast doubt on [their statistical] conclusion....

Guardians Association v. Civil Service Commission, 633 F.2d 232, 240 n. 13 (2d Cir. 1980).

The fifth circuit has adhered to the same view of statistical evidence as the District of Columbia and second circuits. In Falcon v. General Telephone, 626 F.2d 369 (5th Cir. 1980), rev'd on other grounds 457 U.S. 147 (1982), the fifth circuit interpreted Teamsters

> to mean that once the plaintiff has offered some evidence that is probative of disparity that may be statutorily significant, it is then the defendant's burden to come up with more specific statistical evidence to rebut the plaintiff's proof.

626 F.2d at 381. (Emphasis added.) This requirement that statistics be rebutted with evidence, not merely with speculative objections, was applied in Payne v. Travenol Laboratories, Inc., 673 F.2d 788 (5th Cir. 1982), which also relied on Teamsters. The defendant in Payne responded to evidence that white applicants were hired at a higher rate than

black applicants by hypothesizing that black applicants might have failed in disproportionate numbers to actually attend scheduled interviews. The fifth circuit agreed that this was an important consideration, but rejected defendant's argument because the defendant had adduced no evidence of any such disproportion:

> [A] comparison of referred applicants to actual hires omits an important variable: how many applicants Travenol failed to interview because they did not show up. Theoretically, this point is well taken, but its major premise is speculative.... [T]he record indicates there was no evidence how many applicants did not keep their interview dates.

673 F.2d at 822. The defendant in Payne also speculated that the number of black applicants might be inflated because blacks might have filed more duplicate applications than whites. Again the fifth circuit rejected that sort of objection,

insisting that a defendant come forward with evidence to support its contentions that a more complete statistical analysis would have yielded different results.[31]

The rule expressly adopted by the second, fifth and District of Columbia circuits has been applied by at least two other courts of appeals. In Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251 (6th Cir. 1981), the plaintiffs, in seeking to prove that a two year experience requirement would have an adverse impact on female applicants, adduced evidence as to the proportion of men and women employed in the industry involved. The sixth circuit, citing one of the

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> "[T]here was no testimony that black duplicates occurred at a greater rate than white duplicates, and we are unwilling to make such an assumption without evidence in the record to support it."

673 F.2d at 822.

District of Columbia cases noted above,[32] held this evidence "sufficiently probative" of disparate impact to establish a prima facie case, and stressed that the defendant had failed to offer "countervailing evidence" to rebut the inference that arose from the plaintiff's rather general data. 645 F.2d at 1259. In Craik v. Minnesota State University Board, 731 F.2d 465 (8th Cir. 1984), the defendant criticized a statistical analysis offered by plaintiff because it had included some administrators among the teachers whose treatment was at issue. The eighth circuit, again citing one of the District of Columbia opinions mentioned earlier,[33] dismissed that objection, noting that the defendant had declined to offer

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[32] Davis v. Califano is cited at 645 F.2d at 1259 n. 7; see n. 30, supra.

[33] Trout v. Lehman is cited at 731 F.2d at 477 n. 15.

any evidence as to the impact of correcting this over inclusion.[34]

The panel decision in the instant case has the practical effect of forbidding the use of statistics in the fourth circuit to prove either intentional discrimination or disparate impact. As Judge Phillips noted in his dissent, no statistics could ever be sufficiently complete to meet the majority's standard, since it will always be possible for a defendant or a court to conceive of some other factor that might have been considered in any statistical analysis. Without the use of statistics, proof of discriminatory intent will often be impossible. Since statistics are the only

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[34] "The effect of the inclusion of such a small proportion of administrators is not obvious, and the defendants chose not to rework the multiple regression analyses on a corrected data base in order to demonstrate that the result would be more favorable to them." 731 F.2d at 477 n. 15.

method by which a plaintiff can establish that a test or job requirement had a disparate impact, the fourth circuit's decision effectively nullifies Griggs v. Duke Power Co., 401 U.S. 424 (1971). In Maryland, Virginia, West Virginia and the Carolinas today,the enforcement of Title VII has been severely impeded. Certiorari should be granted to correct that situation and to resolve the inter-circuit conflict created by the decision below.

III. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH GREEN V. SCHOOL BOARD OF NEW KENT COUNTY, 391 U.S. 430 (1968)

The panel decision in this case marks the resuscitation of a fourth circuit remedial doctrine unanimously condemned by this Court some 18 years ago.

In Green v. School Board of New Kent County, 391 U.S. 430 (1968), the officials of the de jure segregated school system

adopted, in response to Brown v. Board of Education, a "freedom of choice" plan which left students in the schools to which they had originally been assigned on the basis of race, but permitted them to transfer elsewhere on their own initiative. Not a single white child chose to attend a black school, and 85% of all black children remained in black schools. The plan "operated simply to burden children and their parents with a responsibility which Brown II places squarely on the School Board." 391 U.S. at 441-42. The fourth circuit held, however, that that manifestly unsuccessful freedom of choice plan fully satisfied the requirements of Brown, and that there was no longer any actionable violation of the constitution. See Bowman v. County School Board of Charles City County, 382 F.2d 326, 327-28 (4th Cir. 1967).

This Court unanimously reversed, holding that freedom of choice plans were only acceptable if they in fact disestablished the de jure system that the state had created:

> The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now . . . [I]f [freedom of choice] fails to undo segregation, other means must be used to achieve this end. The Board must be required to formulate a new plan ... which promise[s] realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.

391 U.S. at 437. Following the decision in Green, the United States Department of Agriculture adopted regulations governing the desegregation of programs such as the North Carolina 4-H clubs:

> In administering a program regarding which the recipient has previously discriminated against persons on the ground of race ... the recipient must take affirmative action to

> overcome the effects of prior discrimination.

7 C.F.R. §15.3(b)(6)(i). The requirements of this regulation parallel those of Green itself.

The 4-H clubs in North Carolina were for years operated on a strictly de jure segregated basis.[35] Separate all-black and all-white clubs existed in the same communities. In 1965 state officials adopted a freedom of choice plan similar to that in Green, and in North Carolina that plan failed just as it had in Green itself. In 1965, prior to the adoption of the freedom of choice plan, there were 1,474 all-white 4-H clubs; after 15 years of freedom of choice there were 1,348 all-white clubs.[36] Between 1972 and 1980

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[35] The history of Extension Homemaker Clubs, which are also supported by NCAES, is essentially similar to that of the 4-H Clubs.

[36] App. 1806, 2237; Ex. 11, 115; 472a.

the number of single race clubs in racially mixed communities declined by less than 2%.[37] Far from converting the North Carolina system from "black" clubs and "white" clubs to just clubs, the freedom of choice plan had what Judge Phillips accurately described as only a "minimal" effect. (471a).

The panel opinion in the case did not suggest that the 1965 freedom of choice plan had succeeded. Rather, the majority adopted precisely the position taken by the fourth circuit in Green itself -- that a state which establishes a de jure segregated system need do no more to meet its legal obligations than refrain from new additional acts of discrimination. (368a,424a, n.128).[38] As Judge Phillips

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[37] App. 1807, 1813; 472a.

[38] The evidence also clearly indicated a pattern of post-1965 intentional racial discrimination in the recruiting of club members (475a-77a). Again, the majority evidently believed that the very existence of a freedom of choice plan fully remedied

noted in his dissent, the opinions below do not even purport to find that the defendants satisfied the requirements of Green or of the Department of Agriculture regulations. (474a-75a). The panel majority was apparently of the view that the fourth circuit is somehow free to refuse at will to enforce either Green or the duly promulgated applicable federal regulations. No reasons were given by the majority for its refusal to do so, and no legitimate basis for that action is conceivable.

IV. THE DECISION OF THE COURT OF APPEALS RAISES AN IMPORTANT QUESTION AS TO THE MEANING OF GENERAL BUILDING CONTRACTORS v. PENNSYLVANIA, 458 U.S. 375 (1982)

Three years ago in General Building Contractors v. Pennsylvania, this Court

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any injuries that might be occasioned by such ongoing discrimination.

held that section 1981 permits an employer to delegate its hiring decisions to a third party which engages in intentional racial discrimination. In rejecting Pennsylvania's argument that section 1981 imposed a non-delegable duty to hire on a non-racial basis, the Court stressed that liability under section 1981 required proof of discriminatory intent on the part of the employer.

The fourth circuit decision in this case extends the holding in General Building Contractors to Title VII, despite the fact that Title VII, unlike section 1981, contains no such intent requirement. Griggs v. Duke Power Co, 401 U.S. 424 (1971).In selecting County Chairmen, NCAES followed one of two procedures. In most instances NCAES made the decision itself, approving only a single applicant and forwarding his or her name to elected county officials for a pro forma ratifi-

cation. In some cases, however, NCAES would recommend several candidates to the county officials, and delegate to those local authorities the final selection.

The record in this case made clear that county officials invariably exercised any such delegated authority in a racial manner and the Court of Appeals did not hold otherwise. In every instance in which NCAES recommended both a black and a white applicant, the county officials chose to select the white applicant. As a result, although blacks account for 25% of the full agents, the position from which County Chairmen are chosen, only 2.6% of the County Chairmen selected between 1962 and 1981 were black. (406a).

The fourth circuit, however, concluded that Title VII permitted NCAES to delegate its selection decisions to discriminatory county officials. NCAES, it held, was "not separately responsible

for the appointment" decisions made by such county officials. (412a). So long as NCAES "recommended" blacks as well as whites, the agency was not legally accountable if, as invariably occurred, county officials chose only whites. In the fourth circuit's view it was irrelevant that this delegation practice had a 100% adverse impact on black applicants or that NCAES officials must have been aware of the county level discrimination. Nor did the fourth circuit think it important that in this case NCAES resorted to delegation in a racially selected manner. Although NCAES approved only a single applicant in 83% of all cases,[39] NCAES has never recommended a black for a job which a white male had applied without also recommending at least one white male as

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[39] NCAES recommended only a single applicant in 94 of 113 cases. See charts following 419a.

well.[40] The court of appeals insisted that NCAES was immune from liability so long as it was "recommending" a substantial number of blacks, regardless of whether the counties were invariably and predictably rejecting all of those black applicants.

The decision below is squarely inconsistent with this Court's opinion in Arizona Governing Committee v. Norris, 77 L.Ed.2d 1236 (1983). In Norris, the defendant insisted that it could not be held liable for discrimination engaged in by independent operators of a pension plan funded by the defendant employer. This Court rejected that contention, holding that under Title VII "employers are ultimately responsible for the 'compensation, terms, conditions, [and] terms of employment'." 77 L.Ed.2d at 1292. It reasoned, "We do not think it makes

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[40] In the only two instances in which NCAES recommended only a black for a position for which a white had applied, the white applicant was a woman. Id.

any . . . difference . . . that the employer engaged third parties to provide a benefit rather than directly providing the benefit itself." Id. at 1292 n. 21. The decision here whether to promote to County Chairman blacks as well as whites is as central to the employment relationship, and as non-delegable, as was the decision in Norris whether to provide to female employees the same pensions that were accorded to male workers.

The fourth circuit decision in this case is an open invitation for employers to evade the requirements of Title VII. Under the principles of the decision below, an employer is free to delegate to a third party any employment decision that might violate the law. Thus, while an employer may not select its workers on the basis of a non-job related discriminatory test, it could legally delegate hiring authority to an agency or individual that

utilized that very test. Such a rule represents a radical and unwarranted extension of General Building Conractors and should be reconsidered by this Court.

V. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH EISEN v. CARLISLE & JACQUELIN, 417 U.S. 156 (1974)

A decade ago in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), this Court made clear that Rule 23 class actions were not to be limited to claims which a court had already decided were meritorious. "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs . . . will prevail, but rather whether the requirements of Rule 23 are met." 417 U.S. at 178. Eisen reiterated the purpose and standards of Rule 23, which was framed to provide an opportunity for the resolution of class-wide claims, some of which would, of course, inevitably prove unsuccessful.

The district court decision in this case denied certification on grounds which the fourth circuit declined to sustain.[41] The panel majority, however, insisted that this case could not be certified as a class action because there were no meritorious class claims. Petitioners alleged a class-wide state practice of perpetuating pre-Act intentional wage discrimination; the fourth circuit denied certification as to that issue because it believed the practice to be lawful.[42] Petitioners alleged that the state had a non-delegable duty to select County Chairmen on a racially neutral basis; the

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[41] The district court held (1) that no class action could be maintained in a private Title VII action if the United States filed a related pattern and practice action (44a-46a), and (2) that no class action could ever be maintained on behalf of employees working at different locations. (43a-44a). Judge Phillips described the errors underlying this reasoning in his dissent. (426a-433a).

[42] Compare, 369a with 380a-82a.

fourth circuit denied certification as to that issue because it believed there was no such duty.[43] Petitioners alleged that the continued operation of over a thousand single-race 4-H clubs violated both the Constitution and the applicable federal regulations; certification was denied on the ground that the fourth circuit believed the operation of those clubs to be entirely legal.[44]

On the fourth circuit's view, class certification cannot be granted unless the party seeking certification proves, or at least alleges, a "legally cognizable wrong." (372a). In this case the court below concluded that the facts in the record did not constitute a "legally cognizable wrong" because the fourth circuit rejected on the merits petitioners' contentions as to the legal

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43 369a-370a.

44 370a-371a.

principles applicable to those facts. But Rule 23 is available for the litigation of "common issues of law" as well as common issues of fact. The decision below that there were no "legally cognizable wrongs" constitutes, not a finding that there were no such common issues of law, but an adverse resolution of those very common issues. Eisen forbids denial of class certification on such a basis.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the fourth circuit.

Respectfully submitted,

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